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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT O. WIMMER, PETITIONER

V.

JOHN F. LEHMAN, JR.,

SECRETARY OF THE NAVY, ET AL.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

J. B. STEVENS, JR.
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Annapolis, Maryland
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QUESTIONS PRESENTED

1. Whether a midshipman at the United States Naval Academy is entitled to full representation by counsel at a military disciplinary proceeding when criminal charges involving the same transaction are pending in a state civilian court.

2. Whether the Secretary of the Navy is authorized, under 10 U.S.C. § 6959, to place an involuntarily disenrolled midshipman on active duty as an enlisted man in the United States Naval Reserve for a period of three years.

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IN THE SUPREME COURT OF THE UNITED STATES

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NO.

ROBERT O. WIMMER, PETITIONER

v.

JOHN F. LEHMAN, JR.,

SECRETARY OF THE NAVY, ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE FOURTH CIRCUIT

J. B. Stevens, Jr., on behalf of ROBERT O. WIMMER, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

* The other party to this case is Respondent Admiral E. C. Waller, Superintendent of the U.S. Naval Academy

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-24a) is reported at 705 F.2d. 1402. There was no formal opinion of the district court; however, the transcript in the court, consisting of the judge's statement on granting the preliminary injunction in favor of the petitioner, is reproduced here (App. B, infra. 18a-50a).

JURISDICTION

The judgment of the court of appeals (App. D, infra, 54a) was entered on April 28, 1983, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 10:

§ 6959. Midshipmen: agreement for length of service

"(a) Each midshipman who is a citizen or national of the United States shall sign an agreement that, unless sooner separated, he will--

(1) complete the course of instruc-

tion at the Naval Academy;
(2) accept an appointment and serve as a commissioned officer of the Regular Navy, the Regular Marine Corps, or the Regular Air Force for at least five years immediately after graduation; and
(3) accept an appointment as a commissioned officer in the reserve component of the Navy or the Marine Corps, or as a Reserve in the Air Force for service in the Air Force Reserve and remain therein until the sixth anniversary of his graduation if an appointment in the regular component of that armed force is not tendered to him or if he is permitted to resign as a commissioned officer of that component before that anniversary, if the midshipman is a minor and has parents or a guardian, he may sign the agreement only with the consent of the parents or guardian.

(b) A midshipman who does not fulfill his agreement under subsection (a) may be transferred by the Secretary of the Navy to the Naval Reserve or the Marine Corps Reserve in appropriate enlisted grade or rating, and, notwithstanding section 651 of this title, may be ordered to active duty to serve in that grade or rating for such period of time as the Secretary prescribes but not for more than four years."

United States Code, Title 10:

§ 6962.

"(a) The superintendent of the Naval Academy shall submit to the Secretary of the Navy in writing a full report of the facts--
(1) whenever the Superintendent determines that the conduct of a midshipman is unsatisfactory; or
(2) whenever the Academic Board unanimously determines that a midshipman

possesses insufficient aptitude to become a commissioned officer in the naval service.

(b) A midshipman upon whom a report is made under subsection (a) shall be given an opportunity to examine the report and submit a written statement thereon. If the Secretary believes, on the basis of the report and statement, that the determination of the Superintendent or of the Academic Board is reasonable and well founded, he may discharge the midshipman from the Naval Academy and from the naval service."

STATEMENT OF THE CASE

In the early morning hours of December 13, 1981, Robert O. Wimmer, a fourth-year midshipman at the U.S. Naval Academy, was stopped by an officer of the Annapolis City Police Department for running a red light. During the course of the stop, the officer allegedly detected what he believed to be marijuana on the floor of the driver's seat, and he placed Midshipman Wimmer under arrest for possession. The State criminal charges for possession of marijuana were lodged that day against Wimmer. At the Naval Academy on the following day, during an interrogation conducted by an agent of the Naval Investigative Service, Wimmer admitted having used marijuana on the night of his

arrest and on two previous occasions. Five days following, Midshipman Wimmer was notified that an investigative hearing would be conducted by an officer assigned to the Naval Academy, for the purpose of determining whether he was guilty of violating the Naval Academy's delinquency code provisions outlawing the use and possession of marijuana on the three separate occasions.

At his disciplinary hearing, held before the trial on the state court criminal charges, the investigative agent and Wimmer offered conflicting versions of whether any inducements or promises of immunity had been made to secure Wimmer's cooperation. Although both military and civilian counsel representing Wimmer were present in the hearing room, neither was permitted, over objection, to examine or cross-examine witnesses, offer evidence, object to evidence, or participate in the hearing process. By advance instruction from the Commandant of Midshipmen, counsel were allowed to be present only for the purpose of observing the proceed-

ings and to advise Midshipman Wimmer whether or not to answer questions, so as to prepare for the state criminal proceeding. Wimmer was specifically instructed to conduct his own defense.

Wimmer was found guilty of violating the Academy's delinquency Code. The investigating officer's report was affirmed in a separate hearing before the Commandant of Midshipmen, who recommended that Wimmer be discharged from the Academy, transferred to the Naval Reserve, and placed on active duty as an enlisted man for a period of three years. The Secretary adopted these recommendations and this action was initiated in the United States District Court for the District of Maryland, as a civil action arising under the laws of the United States.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS OF PROCEDURAL DUE PROCESS REQUIREMENTS IN A CONTEXT NOT CONSIDERED HERETOFORE BY THIS COURT.

The Fourth Circuit's decision regarding Wimmer's right to counsel reflects important policy considerations involving disciplinary proceedings which occur against a background of pending criminal charges.

At the time of Wimmer's disciplinary hearing, there was significantly more at risk than expulsion from the Naval Academy and the possibility of being placed on active military duty as an enlisted man, although both consequences were quite severe. State criminal charges for possession of marijuana charges were pending against Wimmer. More significantly, perhaps, the U.S. Navy--vested with the authority to conduct the disciplinary hearing--also retaining the option of bringing charges against Wimmer, pursuant to 10 U.S.C. § 820, for possession of marijuana, in violation of 10 U.S.C. § 934, the maximum penalty for which was two years of hard labor. Manual of Courts Martial, 1969 (Rev.), Change 6, para. 127.

Despite the many possible adverse consequences which might arise from the hearing,

Wimmer was charged with the conduct of his own defense--his attorneys were present only to safeguard his rights at the pending state criminal proceedings and not to affect the outcome of the disciplinary proceedings. Even taking into account the military's interest in preserving good order and discipline, Parker v. Levy, 417 U.S. 733 (1973), the cumulative effect of the pending and potential proceedings against Wimmer were such that he could hardly be expected to conduct his own defense at the disciplinary proceedings. Even though counsel was physically present at the hearing, that did Wimmer little good in conducting his own defense. "The right to be heard, would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Conversely, the right to be represented by counsel would be of little avail if counsel could not be heard. A competent attorney can ". . .help deliniate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard

the interests of the recipient." Goldberg v. Kelly, 397 U.S. 254, 270-271 (1970).

In Goss v. Lopez, 419 U.S. 565 (1975), where a ten-day suspension from a public school was at issue, the Court allowed for the possibility of assistance of counsel "in difficult cases". Id. at 584. In a number of cases involving the right to counsel at service academies, however, Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Hagopian v. Knowlton, 470 F.2d. 201 (2d Cir. 1972); Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975), the right to counsel has been generally denied or limited. However, Wimmer was charged with an offense which could subject him to state and military criminal penalties, in addition to disciplinary proceedings, and it is this factor which elevated his private interests to representation over the government's interest in conducting a proceeding without the active assistance of counsel. Matthews v. Eldridge, 424 U.S. 319 (1975).

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF 10 U.S.C. § 6959.

Section 6959 of Title 10 provides that each new midshipman shall sign an agreement that "unless sooner separated," he will complete the course of instruction at the naval academy and accept an appointment and serve an an enlisted man on active duty in the U.S. Navy for not more than four years.

In reliance upon what it conceived to be the plain meaning of the statute and the Navy's interpretation of the statute through its regulations, the Fourth Circuit upheld the Secretary's contention that the phrase "unless sooner separated" means separated from the Naval service; and since Wimmer was separated only from the academy, the active duty service obligation applies. (App. A, infra, pp. 14a-17a).

In so holding, the Fourth Circuit conceded that its interpretations of section 6959 conflicts with that adopted by the Third Circuit in Daughterty v. Lehman, 688 F.2d 158 (3rd Cir. 1982. Charging that the Third Circuit's

analysis of the section's legislative history was "less than conclusive", but without making its own independent analysis, the Fourth Circuit chose to uphold the Navy's interpretation of the statute over that advanced by Wimmer.

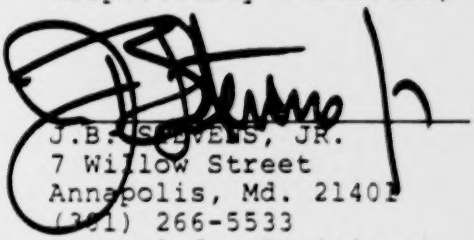
To the contrary, the Third Circuit found that both a literal reading of the clause "unless sooner separated", and its extensive analysis of the legislative history of section 6959 supported the claim that if a midshipman is involuntarily separated from the Naval Academy he is not required to fulfill his active duty agreement. Daugherty, supra, at 164.

The effect of these conflicts is to raise serious potential confusion regarding circumstances under which the Secretary of the Navy may impose an active duty service requirement upon a midshipman separated for misconduct. Further, the ability of the Secretaries of the Air Force and Army to invoke the same service obligations under 10 U.S.C. § 4348 and 10 U.S.C. § 9348, is also implicated by these conflicts.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July, 1983, three copies of this Petition for Write of Certiorari were mailed, postage prepaid, to Bruce G. Forrest, Esq., Civil Division, Room 3617, Department of Justice, Washington, D.C. 20530; and to the Solicitor General, Department of Justice, Washington, D.C. 20530.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1892

Midshipman First Class
Robert O. Wimmer,

Appellee,

v.

The Honorable John F. Lehman, Jr.
Secretary of the Navy,
and
Admiral E. C. Waller, Superintendent,
United States Naval Academy,

Appellants.

No. 82-1893

Midshipman First Class
Robert O. Wimmer,

Appellant,

v.

The Honorable John F. Lehman, Jr.,
Secretary of the Navy
and
Admiral E. C. Waller, Superintendent
United States Naval Academy.

Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Argued: March 7, 1983 Decided: April 28, 1983

Before WINTER, Chief Judge; ERVIN, Circuit Judge; ALDRICH, Senior Circuit Judge.*

Jerome B. Richman (J.B. Stevens, Jr. on brief) for Appellee/Cross-Appellant; Bruce G. Forrest, Civil Division, Dep't. of Justice (CDR Donal M. Hill, Office of the Judge Advocate General, Dep't of the Navy; J. Paul McGrath, Assistant Attorney General; J. Frederick Motz, United States Attorney; Anthony J. Steinmeyer, Civil Division, Dep't of Justice on brief) for Appellants/Cross-Appellees.

ALDRICH, Senior Circuit Judge.

Midshipman Wimmer instituted this action on April 15, 1982 in the United States District Court for the District of Maryland seeking declaratory relief and a preliminary injunction. He sought to enjoin the Secretary of the Navy and the Superintendent of the United States Naval Academy at Annapolis from discharging him from the Academy, because of unsatisfactory conduct, and transferring him to the U. S. Naval Reserve and ordering him to three years active duty. The defendants had taken such action under the authority of 10 U.S.C. §§ 6959 & 6962 after an investigatory hearing at which Wimmer

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* Of the First Circuit, sitting by designation.

was found to have violated the Academy's delinquency code by the possession and use of marijuana. Wimmer contends that he was not accorded due process in that (1) his counsel's function at the hearing was restricted, and (2) he was refused a continuance until after a state criminal trial, arising out of the same events, had taken place. He further claims that the Secretary had no statutory authority to assign him to three years active service as an enlisted man. The district court found that Wimmer was likely to succeed on the merits of his two due process claims, but not on his statutory claim. Based on this, and other findings, it preliminarily enjoined Wimmer's discharge. The parties filed interlocutory cross appeals, but agree that the record is complete and that we can make a final determination on the merits. Concluding that Wimmer is not entitled to relief on any of his claims, we reverse.

The background of the case is that in August, 1979 Wimmer signed an extensive docu-

ment entitled "Statement and Acknowledgement of the Anti-Drug Abuse Policy of the U. S. Naval Academy." This read in part,

> "I have been fully informed that the U. S. Naval Academy will not tolerate any drug abuse by a midshipman at any time or place whether in a duty, leave or liberty status or whether at the Naval Academy or elsewhere.
>
> . . . .
>
> "I have been informed that the Maryland State Law provides for imprisonment up to 5 years and/or a fine up to $15,000 for trafficking in marijuana. The mere possession of the minutest amount of marijuana is punishable under Maryland Law by both a fine and imprisonment of up to 1 year.
>
> "Finally, I acknowledge my understanding that, in addition to the federal, state, and local criminal liabilities that may be incurred as a result of drug abuse, an involved midshipman, wherever and whenever the offense occurs, will also be subject to separation from the Naval Academy by the Secretary of the Navy for unsatisfactory conduct in accordance with 10 U.S. Code, §6962."

Early in the morning of December 13, 1981 Wimmer was stopped by an officer of the Annapolis Police Department for running a red light. While requesting his license the offi-

cer observed, in plain view, what appeared, and ultimately proved, to be a small quantity of marijuana. Wimmer was taken to the station, and subsequently charged with possession. On December 18 he was notified by the Academy of an Investigative Hearing to make findings concerning his alleged misconduct, the notice containing an extensive description of the charges, the procedures to be used, and of his rights. The notice informed him that he could have counsel present to advise him with respect to safeguarding his interests regarding his pending state criminal trial,[1] but that in all other respects he must conduct his own defense. He was informed that he might "testify or remain silent," which, contrary to usual practice, entitled him to the protection of the Fifth Amendment as much, or as little, as he saw fit, and that no inferences would be drawn against him.

The hearing was held on January 13,

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1. Cf. Gabrilowitz v. Newman, 582 F.2d 100 (1 Cir. 1980).

1982. Wimmer's objections at the outset to the restrictions placed upon his attending counsel, and to the denial of the postponement, were overruled. Following the hearing the Investigating Officer filed a written summary of the evidence (agreed, for present purposes, to constitute the complete factual record for appeal) and made findings that Wimmer was guilty of the offenses charged. This report was forwarded to the Commandant of Midshipmen, who then held a hearing at which Wimmer was allowed to attend and present additional evidence if he desired. He attended, but offered none. The Commandant upheld all rulings of the Investigating Officer, and, based on all the evidence, recommended to the Superintendent that Wimmer be discharged from the Academy. The Superintendent in turn, recommended to the Secretary that Wimmer be discharged from the Academy and be transferred to the Naval Reserve for active duty in an enlisted status for three years. The Secretary adopted these recommendations and this action followed.

Due Process - Procedure

Concededly, Wimmer could not be deprived of the opportunity to obtain his commission without procedural due process. What process is due is not so clear. It is a commonplace that, except in certain standard situations, "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471 (1972). See, also Goss v. Lopez, 419 U.S. 565, 577-78 (1975); Hagopian v. Knowlton, 470 F.2d 201, 207-08 (2 Cir., 1972). We also note the Court's phraseology in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) which requires consideration of

> "the risk of an erroneous deprivation of [his] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. . ."[2]

2. The court pointed out that any showing in this respect was to be balanced against the government's interest in maintaining the procedure it adopted. We do not find it necessary to stress this factor, except to say that the Navy's interest in a relatively informal procedure, provided it is fairly conducted, is obvious.

What is at issue here is not access to counsel, but, specifically, the opportunity to have counsel, instead of oneself, examine and cross-examine witnesses, make objections,[3] and argue the case at the hearing level.[4] No other limitation was imposed. Prior to the hearing, Wimmer was given full notice of the charges, a copy of the arresting officer's report, a copy of the report of the Naval Investigative Service officer who interviewed Wimmer, and a copy of the chemical analysis. At the hearing he was permitted to question witnesses called by the Investigating Officer, to present evidence and witnesses of his own and, in general, to conduct a full defense.

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3. Under the Naval Investigative Hearing procedure, objections are not argued, but are merely noted on the record and resolved by the Commandant.

4. Counsel was permitted to submit an extensive written presentation to the Secretary of the Navy in connection with the last step of Wimmer's appeal.

Viewed a priori, to say that an individual of a midshipman's presumed intelligence, selected because he is expected to be able to care for himself and others, often under difficult circumstances, and who has full awareness of what he is facing, with counsel's advice, is deprived of due process by being required to present his defense in person at an investigatory hearing is not persuasive. See Hagopian v. Knowlton, 470 F.2d, ante at 211-12. The hearing was non-criminal, and was conducted in a non-adversarial manner; there was no opposing counsel, and the hearing was conducted entirely by the Investigating Officer. Wimmer would make much of the fact that he was exposed to criminal liability, but that mere fact, apart from possible prejudice to his criminal defense, post, cannot change the intrinsic nature of the hearing. Absent some special showing, post, we see no due process infringement. See Wasson v. Trowbridge, 282 F.2d 807 (2 Cir., 1967). Cf. Sohmer v. Kinnard, 535 F. Supp. 50 (D.Md., 1982); Kolesa v. Lehman, 534 F. Supp. 590 (N.D.N.Y., 1982).

Due Process - Prejudice

Wimmer's claimed prejudice, put simply, is the loss of an attorney's special ability to elicit favorable testimony from witnesses.

At the hearing, following the arresting officer's testimony, Special Agent Curley of the NIS testified to interviewing Wimmer the day following his arrest. He stated that Wimmer executed a waiver, post, and then admitted possessing marijuana, and sharing it on several prior occasions with other, unnamed, midshipmen. When questioned by Wimmer, Curley testified that after Wimmer's confession he said he might try to help him with the state officers, but that there was no talk or promises about any Academy "deals."

One Burke, a state officer, testified to a conversation with Wimmer about a possible state arrangement if he and his companions would help identify suppliers, but he, likewise, said nothing about Academy internal procedures.

On his own behalf, Wimmer testified about state police talk of possible cooperation, and that he assumed, when contact was made with him by Curley, that it was part of a deal that included the Academy. When questioned by the Investigating Officer about the waiver form he signed,[5] he said he thought it "just an official way of handling the problem" and that he did not realize his statements really would be used against him. He testified that Curley told him that he could make no promises about the Commandant, but that "things would go easier on me if I was up front." He refused to answer all direct questions about use or possession of marijuana, or the truth of statements he had made, citing his Fifth Amendment right to remain silent.

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5. The paper, prominently labelled MILITARY SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS, stated,

> "I have been advised by Special Agent(s) P.J. Curley that I am suspected of use, possession and/or transfer of Marijuana, narcotics, and/or dangerous drugs.
>
> "I have also been advised that:
>
> (1) I have the right to remain silent and make no statement at all;

The Investigating Officer found the facts to be in accordance with Wimmer's confession as testified to by Curley. With regard to the claim that Wimmer had made the statement in the belief that it would not be used against him, the Investigating Officer stated,

> "I inquired thoroughly into Respondent's assertions that he believed no adverse use would be made of his confession if he cooperated. I found absolutely no proof that anyone associated with the Naval Academy had attempted to persuade Respondent to confess by promising or even implying that his admissions would not be used against him."

> (2) Any statement I do make can be used against me in a trial by court-martial or other judicial or administrative proceeding;
>
> . . . . .
>
> "I understand my rights as related to me as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me."

In addition to signing directly under the last paragraph, Wimmer's initials were placed against the numbered paragraphs.

The district court reached a different conclusion.

> "Wimmer contends that the confessions were given on the strength of implicit or explicit assurance by Burke and Curley that no use would be made of them by the Academy, and that Wimmer would be subject to no Academy discipline for his use of the marijuana. Burke and Curley deny making any such promises. Whether these promises were made and whether, if made, it was reasonable for Wimmer to rely on them, are crucial, because Wimmer was aware that the Academy's penalties for marijuana use were severe.
>
> . . . . .
>
> "[F]ull cross-examination by counsel of Burke and Curley might well have elicited facts to support Wimmer's contention that he made his confession pursuant to a promise that no proceeding at all would be brought against him by the Navy if he confessed. This, then, is much more than merely using the confession as evidence against him. If the promises had been made, the validity of the entire administrative proceeding would be suspect. Harmless error, therefore, is not an appropriate doctrine on this record."

We do not know what Wimmer's counsel may have said with regard to the record, but we must find these suppositions totally unwarranted. Passing the fact that no promise by Burke could bind the Academy, Wimmer, surely his own most

favorable witness, testified to no such promises, by either Burke or Curley. Quite apart from the disclaimer in his written waiver, which it is difficult to think any finder of fact could overlook, on Wimmer's own testimony Curley told him he could make no promises about the Commandant. A statement, 'I can't make any promises for the Commandant, but things will go better for you if you are up front,' is an express denial of a promise, and, insofar as prophecy, is certainly not that no proceedings will be brought against him by the Navy. Indeed, as a prophecy it can be said to have been borne out, since there was no court martial, as there could well have been. We cannot think that even the most skillful cross-examiner could have elicited statements from Curley that Wimmer testified were affirmatively disclaimed. So far as Burke was concerned, there is equally no reason to assume that counsel could have elicted from him anything more favorable than Wimmer's own testimony of what was said; in other words, nothing of substance.

Our appraisal of the record is confirmed by Wimmer's counsel's extensive letter of March 29 to defendant Secretary, in effect a brief on final appeal.[6] In it counsel dealt with Wimmer's alleged prejudice from being deprived of the full use of counsel as follows.

> "If counsel had been permitted to assist Midshipman Wimmer in the examination of witnesses and the presentation of evidence, Midshipman Wimmer could have more fully developed ... that Officer Burke would cause the State charges to be dismissed against Midshipman Wimmer if he cooperated and worked as an informant ... [and that Wimmer] believe[d] that cooperation with NIS Agent Curley was expected of him by Officer Burke as part of the cooperation he, Burke, required ...." (Emphasis suppl.)

There was no suggestion in this letter of loss of any opportunity of developing promises by anyone of Naval clemency.

In sum, we are of the opinion that the Academy's Investigative Hearing procedure does not offend due process, but that, even if we

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6. There had been an intermediate proceeding, a hearing before the Commandant on January 25, at which Wimmer was afforded the opportunity to introduce further evidence, but offered none.

are mistaken, the deprivation of examining counsel was harmless error as a matter of law in the present case.

Due Process - Failure to Await State Proceedings

There can be no claim that Wimmer's state trial suffered from the fact that the Naval hearing preceded it, since he was found not guilty.[7] Nor can we see how the overhanging threat of these proceedings prejudiced Wimmer at the hearing. In his brief Wimmer, largely quoting from the district court's opinion, says,

> "Wimmer was thus faced with a difficult decision. If he chose to testify fully at the administrative hearing he could very well have been prejudiced in the defense of this State criminal case. Likewise, this testimony could also be used against him in a courts martial. On the other hand, if he testified only partially, (as in fact he did) he might very well prejudice his defense to the administrative charges."

7. This finding resulted from the state's failure to have one of its exhibits available and the court's refusal of a postponement.

The basis of this claim is not explained, nor is it readily apparent. Since no inferences were to be drawn against him from silence, it is difficult to see how it could have helped him to waive the Fifth Amendment and, by testifying fully, admit the offense. If, on the other hand, he was prepared to deny the offense, this could not have prejudiced him at the criminal trial.

Counsel's letter to the Secretary indicates that Wimmer may have desired to testify in mitigation of the offense; claiming, for example, that the reason he used marijuana was due to peer pressure. This would scarcely seem an excuse; his strong duty was to exert pressure in the opposite direction. But the first problem with this argument is that the purpose of the first hearing was only to decide guilt or innocence of the charge; Wimmer would have gained nothing by offering excuses for his conduct there.[8] The more basic problem, how-

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8. But see n.6, ante.

ever, is that any argument predicated on the assumption that Wimmer committed the offense, but did not want to admit it until after the criminal trial, must, ipso facto, mean that he concedes its commission. That the Navy should have to adapt its procedures to fit the personal convenience of someone who had broken one of its important rules because he had corresponding difficulties with the state should answer itself.

In any event, difficult choices are imposed upon defendants and litigants in many situations. See, e.g., McGauth v. California, 402 U.S. 183, 213-20 (1971), vacated on other grounds, 408 U.S. 941; United States v. White, 589 F.2d 1283, 1286-87 (5 Cir., 1979); Arthurs v. Stern, 560 F.2d 477 (1 Cir., 1977). Even if the overhanging threat of the criminal trial created some hard choices for Wimmer at the hearing, the Navy's strong interest in concluding its proceedings preclude delay due to Wimmer's state case. Provided it respected his Fifth Amendment rights, which it more than

fully did, both by drawing no inferences, and by permitting the limited presence of counsel, Gabrilowitz v. Newman, 582 F.2d 100 (1 Cir., 1980), it owed him no duty to subordinate its general interests. Cases ante. The district court's conclusion that "fundamental fairness required a continuance under these circumstances," is unsupported by the authorities, and cannot stand.

Assignment to Active Duty

Acting under 10 U.S.C. § 6959 the Secretary transferred Wimmer to the Naval Reserve and ordered him to active duty for a period of three years. This section provides

> (a) Each midshipman ... shall sign an agreement that, unless sooner separated, he will --
> (1) complete the course of instruction at the Naval Academy;
> (2) accept an appointment to serve as a commissioned officer ....
>
> . . . . .
>
> (b) A midshipman who does not fulfill his agreement under subsection (a) may be transferred by the Secretary of the Navy to the Naval Reserve or the Marine Corps Reserve in an appropriate enlisted grade or rating, and ... may be ordered to active duty

> to serve in that grade or rating for such period of time as the Secretary prescribes but not for more than four years."

The parties disagree as to subsection (b)'s applicability. The Secretary contends that Wimmer did not "complete the course of instruction," hence he did not "fulfill his agreement," and hence he "may be ordered to active duty." Wimmer replies that all of these provisions are dependent upon the clause in subsection (a), "unless sooner separated," which, of course, is true. The Secretary argues that the phrase means separated from the Navy, and, since Wimmer was separated only from the Academy, subsection (b) still applies. In his initial brief Wimmer agreed that the phrase means separated from the Navy, but argued that under § 6962,[9] pursuant to which

---

9. "(a) The Superintendent of the Naval Academy shall submit to the Secretary of the Navy in writing a full report of the facts--

> (1) whenever the Superintendent determines that the conduct of a midshipman is unsatisfactory; or (2) whenever the Academic Board unanimously determines that a midshipman possesses insufficient

he was separated from the Academy, he was, perforce, separated from the Navy as well. This would construe section 6962's final language, "he may discharge the midshipman from the Naval Academy and from the naval service," as denying to the word "and" any meaning other than conjunctive. Not only would this make the total phrase repetitive, since a discharge from the service would necessarily effectuate a discharge from the Academy, and hence would be a construction to be avoided, e.g., Colautti v. Franklin, 439 U.S. 379, 392 (1979); Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307-08 (1961), but, by denying the Secretary a choice, would produce an unreasonable result. The

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aptitude to become a commissioned officer in the naval service.

(b) A midshipman upon whom a report is made under subsection (a) shall be given an opportunity to examine the report and submit a written statement thereon. If the Secretary believes, on the basis of the report and statement, that the determination of the Superintendent or of the Academic Board is reasonable and well founded, he may discharge the midshipman from the Naval Academy and from the naval service." 10 U.S.C. § 6962.

fact that an individual is discharged from the Academy, or is found to possess "insufficient aptitude to become a commissioned officer in the naval service," does not necessarily mean he could not be competent seaman. It would be a great waste for the government to lose its investment in training what proved to be unsatisfactory midshipmen if it could not put them in a lesser spot which they were capable of filling. To construe section 6962 as necessarily requiring discharge from the entire service would produce a purposeless and most unfortunate result. The district court rejected it, and we agree.

In his reply brief Wimmer shifts his reasoning, and asserts that prior to the addition of subsection (b), "unless sooner separated" logically only meant unless sooner separated from the Academy, and since he was in fact separated from the Academy, subsection (b) cannot apply. This produces no better sense.

We are aware that the contrary result

has been reached in the Third Circuit in Dougherty v. Lehman, 688 F. 2d 158 (3 Cir., 1982), through an extensive analysis of what, to us, is less than conclusive legislative history. With respect, we are unable to follow the court's reasoning, including its final observation that it might reach a different result if the midshipman committed the particular misconduct for the express purpose of being discharged and avoiding his obligations. Although such an exception would seem better than never allowing the Secretary a freedom of choice, we see nothing in the statutory language that could cause its meaning to depend upon the midshipman's subjective intent. We are particularly troubled by the court's dismissal, as "plainly erroneous or inconsistent with the [statute]," Naval regulations which it concedes

> "unequivocally read § 6959 to authorize the action taken in this case."[7]

---

7. See Department of Defense Directive 1332.23 § V.A. 2; Bureau of Naval Personnel Manual, art. 3850400, §§ 3,6.b(4)."

The worse we could say is that there may be an ambiguity. In these circumstances we will not reject the Navy's interpretation. Udall v. Tallman, 380 U.S. 1, 16 (1965).

Reversed.

APPENDIX B

2.

P R O C E E D I N G S

ORAL OPINION

THE COURT: Presently before the Court in this civil action is plaintiff's motion for a preliminary injunction. The plaintiff, Robert O. Wimmer (hereinafter "Wimmer"), a fourth-year midshipman at the United States Naval Academy in Annapolis, Maryland (hereinafter referred to as "The Academy"), seeks to have this Court enjoin defendants, the Secretary of the Navy and the Superintendent of the Academy, from separating him from the Academy and from assigning him to active duty as an enlisted man.

Memoranda of law have been submitted and reviewed by the Court, and the Court has also reviewed the extensive record which has been filed, including numerous exhibits. Oral argument has been heard in open court this afternoon. For the reasons to be

stated, this Court concludes that the motion should be granted.

The essential facts are not in dispute. Wimmer was stopped early in the morning of December 13, 1981, on an Annapolis street by Officer Howard Taksey (hereinafter "Taksey") of the Annapolis Police Department. While issuing a citation for a traffic violation, Taksey observed on the floor of Wimmer's car a Frisbee containing a substance he suspected to be marijuana. Taksey then arrested Wimmer. A search also revealed a smoking pipe in the car. After Wimmer was booked, trial for violation of the Maryland Drug Abuse Laws, Maryland Annotated Code, Article 27, Section 276 et seq., was set for March 19, 1982, and Wimmer was released on his personal recognizance. On the following day Wimmer spoke separately with Neil Burke (hereinafter "Burke") a narcotics investigator with the Annapolis Police Department and with Special Agent Philip J. Curley (hereinafter "Curley") of the Naval Investigative Service. Each apparently obtained an oral confession from

Wimmer, to the effect that the suspect substance was in fact marijuana, that Wimmer had purchased it for use at a Rolling Stones concert, that he had shared it with other unidentified midshipmen, and that he had, on various occasions since then, made use of it.

It is at this point that the accounts of Wimmer and the investigators differ. The point is a crucial one. Wimmer contends that the confessions were given on the strength of implicit or explicit assurance by Burke and Curley that no use would be made of them by the Academy, and that Wimmer would be subject to no Academy discipline for his use of the marijuana. Burke and Curley deny making any such promises. Whether these promises were made and whether, if made, it was reasonable for Wimmer to rely on them, are crucial, because Wimmer was aware that the Academy's penalties for marijuana use were severe. Wimmer had been warned on matriculation, and had signed an acknowledgement that he understood that:

"... in addition to federal, state and local criminal liabilities that may be incurred as a result of drug abuse, an involved midshipman, wherever and whenever the offense occurs, will also be subject to separation from the Naval Academy by the conduct in accordance with 10 U.S. Code, Section 6962."

Wimmer had further been warned and had signed an acknowledgement that midshipmen whose appointments are terminated during their fourth year are normally transferred to the Naval Reserve, to thereafter serve three years as enlisted men or women. Thus, Wimmer was on notice of the seriousness of his giving a confession, notice which gives some color to his claims that he had been promised testimonial immunity or freedom from disciplinary measures in exchange therefor.

In any event, on December 18, 1981, Wimmer was informed that in fact he was to be subjected to disciplinary proceedings for

alleged violations of Delinquency Code, paragraphs 0711.01 and 0711.02, which are part of Midshipmen Administrative Conduct System Instruction, (hereinafter referred to as "the Instruction").

It is undisputed that the hearing process by which Wimmer was subjected followed the standards set forth in the Instruction, in particular under Chapter V. Under Chapter V, disciplinary proceedings for major offenses (of which possession of marijuana is one) occur at four levels. The first stage is an "investigative hearing," which is characterized by the Instruction as "purely administrative and non-adversarial in nature." Paragraph 0501(1). Despite this characterization, the "investigating officer," who conducts the hearing, is directed to make a "finding of guilt or innocence as to each allegation." Paragraph 0509(2). This finding is forwarded to the Commandant of midshipmen, who determine, if the finding is one of guilt, what a proper punishment should be. Paragraph 0510(1). (2). If the punishment is to be separation from the Academy, the

Commandant may only recommend it to the Superintendent of the Academy. Paragraph 0510(a)(a)(3). If the Superintendent approves, he may recommend separation to the Secretary of the Navy. 10 United States Code, Section 6962(a). The Secretary makes the final decision. Section 6962(b).

Although the Instruction calls for a hearing only at the first level, it appears that in Wimmer's case, there were hearings at both the first and second levels. The investigative hearing was held on January 13, 1982, before Lieutenant Commander James E. Bartlett, III, Advocate General Corps, U.S.N. See Record of Major Offense Investigative Hearing. At that hearing, Wimmer was assisted by both appointed military counsel and by his retained civilian counsel. However, these attorneys were not allowed to examine or cross-examine witnesses, or to argue the case since those activities were forbidden by the Instruction, paragraph 0507(1)(c), although counsel were allowed to make motions. Civilian counsel moved for a fuller role in the proceeding, and also for a continu-

ance pending disposition of the state charges. Both motions were denied. The witnesses at this first level hearing included Taksey, Burke, Curley, and a Naval Investigative Service agent who testified that laboratory tests confirmed the suspect substance's identity as marijuana, and also Wimmer himself. Wimmer testified concerning the circumstances surrounding his confession but, in reliance upon his Fifth Amendment rights against self-incrimination, refused, as permitted by paragraph 0515(4)(a), to answer any direct questions as to whether he had knowingly possessed or used marijuana. The investigating officer concluded that Wimmer was "guilty" of the offense charged. The investigating officer made a report, and sent the report, exhibits and a cassette recording of the proceeding to the Commandant.

A subsequent hearing was next held on January 25, 1982, before the Commandant, at which Wimmer was assisted only by military counsel. This hearing was also characterized as informal and administrative. No new evidence was taken,

but the Commandant relied for substantive information entirely upon the submissions from the investigative hearing. At this level, counsel were allowed to make arguments, and counsel for Wimmer pressed again the position that the circumstances under which Wimmer's confession had been taken compromised the Navy's right to discipline Wimmer. The Commandant rejected these contentions. Wimmer was given the opportunity to call witnesses and to make a statement. He made a statement which, while failing to admit guilt, in effect pleaded the mitigating effect of his record in other respects. The Commandant appeared to respond to the argument in mitigation by speaking of Wimmer's academic record as a disappointing one and as showing only a limited promise of leadership. But the Commandant's final remarks appear to indicate that in fact matters other than the marijuana offenses were not truly being considered. The Commandant stated: "The bottom line on this case is,

the institution has a zero tolerance for the use of marijuana. You freely chose to use marijuana, so you were responsible when you took those actions, and you are being held accountable for the action you freely took." (Transcript of Commandant's hearing.)

Before there were any further developments in the Navy proceedings, Wimmer was acquitted in the state criminal proceeding following a trial held in the State District Court on March 19, 1982. Approximately a month later Wimmer was notified that on April 16, 1982 he would be separated from the Academy. Consequently, on April 15, 1982, Wimmer filed the present suit in this court, seeking a declaratory judgment finding that the disciplinary proceedings of the Academy had denied him due process of law. Wimmer is now seeking preliminary and injunctive relief which will restrain the Navy from dismissing him, and from assigning him to the Naval Reserve and then to active duty as an enlisted man. On the same day that suit was filed, a

temporary restraining order was entered by Judge Northrop of this court, to preserve the status quo pending further proceedings in the case. A conference was held before me on April 19, 1982, at which time the defendants agreed that, even though the temporary restraining order would expire before the date of this hearing, the Academy would take no action to separate Wimmer until after this hearing was held.

Presently before the Court is plaintiff's motion for a preliminary injunction. Under Rule 65(a), Federal Rules of Civil Procedure, such an injunction is granted in order:

> "...to preserve the status quo during the course of a litigation in order to prevent irreparable injury to the moving party and in order to preserve the ability of the court to render complete relief."

Federal Leasing, Inc. v. Underwriters at Lloyd's, 487 F. Supp 1248, 1259 (D. Md. 1980) aff'd 650 F. 2d 495 (4th Cir. 1981). An injunction may

be granted by a trial court only after the following four factors have been weighed and considered:

1. Plaintiff's likelihood of prevailing on the merits;

2. The likelihood of irreparable injury to plaintiff if the injunction is not granted;

3. The likelihood of harm to other interested parties if the injunction is granted; and

4. The public interest.

Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 193 (4th Cir. 1977). It is clear from that case that a District Court should first pay close attention to the second and third factors, balancing the hardships to the plaintiff if injunctive relief is not granted, against that to the defendant if it is. If this balance of hardships is struck in favor of the plaintiff, then the other factors diminish in importance. Conversely, if the hardships are equal, or if the balance favors the defendant, then the first factor becomes paramount.

Id., 193-6. In this Court's view the hardships in this case are equal while plaintiff's likelihood of success on the merits is considerable. The question of the public interest likewise balances out here. The hardships balance because, on the one hand, the Navy is properly committed to a policy which cannot tolerate the use of narcotics in any form by future officers. The continued presence of Wimmer at the Academy undermines the perception among midshipmen that the policy is effective, with a predictable deleterious effect on institutional morale. On the other hand, Wimmer faces severe and long-lasting consequences if he is now separated from the Academy, and if he is then transferred to the Naval Reserve and into active duty as an enlisted man. The public interest lies on both sides, since there is an interest both in high morale at the Naval Academy and there is also an interest that the Navy treat an accused midshipman in a fair and constitutional manner. Therefore the determination whether to grant the injunction

comes down to an evaluation of the merits, to which this Court now turns.

Wimmer claims that the basis for the Navy's intention to separate him from the Academy, to deny him his degree and commission, and to compel him to serve three years as an enlisted man, was its determination through the hearing process already described that he had used marijuana. He argues that the hearing process was crucially flawed because of a limitation on his use of counsel, in violation of his constitutional due process rights and his rights under the Administrative Procedure Act, 5 U.S.C. §§500 et seq. (hereinafter the APA). Wimmer contends that the hearing was also flawed because of restraints on his taking the stand in his own defense, also in violation of constitutional due process. Finally, Wimmer contends that any order given to him to serve as an enlisted man would exceed the Navy's authority under 10 United States Code, Section 6962, which assertively requires that a midshipman discharged from the Academy also be discharged from "the Naval service."

Addressing the due process point first, defendants have argued that neither liberty nor property interests of Wimmer were at stake, and that thus no due process rights attach. See Board of Regents v. Roth, 408 U.S. 546, 569 (1972). Clearly no property interest was involved. Simmons v. Brown, 497 F. Supp. 173, 178-9 (D.Md. 1980). But a liberty interest is implicated where there is governmental action foreclosing future employment possibilities in a stigmatizing fashion. See Roth, supra, at 572-4. The defendants have argued that there is no stigma attached to being denied an academic degree for which one has worked for four years, and then being required to serve as an enlisted man in a Navy whose officers include one's classmates. The very statement of the argument exposes its lack of merit. Wimmer faces a very substantial loss of status. Although service as an ordinary seaman may not stigmatize one who enlists as such, service of this sort will inevitably stigmatize one who had trained for four years

for service as an officer but who had been denied his commission at the 11th hour because of a disciplinary offense.

Given, then, that due process is implicated here, the question is, what process is due. More specifically, the question is whether due process required that Wimmer be represented by attorneys, at what stage, and to what extent. These considerations are governed by principles set forth in the oft-cited case of Andrews v. Knowlton, 509 F.2d 898 (2nd Cir. 1975) cert. denied 423 U.S. 873 (1975). The principles in question are as follows:

> "...(D)ue process is not a rigid formula or a simple rule of thumb to be applied undeviatingly to any given set of facts. On the contrary, it is a flexible concept which depends upon the balancing of various factors, including the nature of the private right or interest that is threatened, the extent to which the proceeding is

adversarial in character, the severity and consequences of any action that might be taken, the burden that would be imposed by requiring use of all or part of the full panoply of trial-type procedures, and the existence of other overriding interests, such as the necessity for prompt action in the conduct of crucial military operations."

509 F.2d at 903, quoting Hagopian v. Knowlton, 470 F.2d 201, 207 (2nd Cir. 1972). These criteria were applied to West Point Cadet disciplinary hearings in the Andrews case as follows:

"...(T)he rudiments of a fair hearing in broad outline are plain. The cadet must be apprised of the specific charges against him. He must be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evi-

> dence....The requirement of counsel as an ingredient for fairness is a function of all of the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and non-adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events ... should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel."

509 F.2d at 904, quoting Wasson v. Trowbridge, 382 F.2d 807, 812 (2nd Cir. 1967). In the Andrews case itself, these considerations militated against requiring full participation of counsel because the proceeding

involved there was a true fact-finding hearing within a cadet charging body, leaving de novo fact-finding hearings by an unrelated trial board yet to come, and because the offenses involved were non-criminal. In Wasson and Hagopian, supra, where full participation of counsel was also not required, the charges were likewise non-criminal. By contrast, however, in an opinion based squarely on the Andrews criteria, Judge Ramsey of this court held that a right to counsel did attach in Naval Academy proceedings, where the offense charged could have subjected the plaintiff to civilian criminal charges. Riley v. Hidalgo, Civ. No. R-80-130, Opinion and Order (D.Md. July 30, 1981). This Court would agree with the Riley decision and will apply its principles in this case.

Here, Wimmer was facing serious charges during the Navy proceedings against him and also was faced with state criminal charges at the very time that he appeared for the administrative hearing, with even the

possibility of a military court-martial. The mere fact that the Navy characterized the hearing as administrative and non-adversarial is not determinative. United States v. Dockery, 447 F.2d 1178, 1194 (D.C. Cir. 1971) cert. denied 404 U.S. 950 (1971)(Wright, J., dissenting); See Cerro Metal Products v. Marshall, 620 F.2d 964, 976-9 (3rd Cir. 1980). Under the principles of Middendorf v. Henry, 425 U.S. 25 (1976) and on the record here, this Court concludes that the hearings at issue here were adversarial.

The key stage here was the initial investigative hearing. Counsel were not allowed to participate in a meaningful way, although counsel were indeed present. It was at this stage of the proceeding that a record was made which was later sent on to the Commandant. Although counsel did make arguments before the Commandant, this was solely on the basis of a record already flawed. Counsel could have little effect on the impact of the disciplinary proceedings upon due process interests of

Wimmer by the time of the Commandant's hearing. This Court concludes, applying the Andrews criteria to the facts of this case, that due process required the participation of counsel fully at the investigative hearing stage.

The question, of course, presented here which was not up in the Riley decision, concerned the extent of counsel's participation. Defendants have suggested that, if this Court finds the participation of counsel mandated at all, it should be limited as in Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978). But the facts of Gabrilowitz are quite different from those here. Gabrilowitz involved a state university rather than a military academy. The only penalty that the Gabrilowitz hearing could apparently impose was expulsion and loss of academic credit. Wimmer, by contrast, faces both these sanctions, plus the foreclosure of an expected career, and three years' military service in a status which he might be expected to find onerous, indeed far more serious consequences

than were present in Gabrilowitz.

Under these circumstances, this Court concludes that full participation by counsel was required by due process considerations. See Middendorf v. Henry, supra. Merely having counsel present was simply not enough in view of the serious adverse effects on Wimmer if he was found guilty of the charge. Under the Middendorf criteria, this Court concludes that Wimmer's due process rights were violated by the Navy's denial of full counsel participation. See Birdwell v. Schlesinger, 403 F. Supp. 710 (D.Colo. 1975) where there was reference to procedures of the Air Force Academy which did permit full participation by counsel in an administrative hearing of this sort.

There is another fact in this case which adds color to Wimmer's claim that he was denied due process. At the time of the first administrative hearing, Wimmer was facing state criminal charges, which if proven could have led to a jail sentence. His attorney moved for a continuance of the Navy hearing

until after the state trial. This motion was denied. Wimmer was thus faced with a difficult decision. If he chose to testify fully at the Navy hearing, he could very well have been prejudiced in the defense of his state criminal case. On the other hand, if he testified only partially (as in fact he did), he might very well prejudice his defense to the Navy charges. A continuance would have avoided this dilemma, but the request for a continuance was denied. Fundamental fairness required a continuance under these circumstances, particularly in view of the denial of counsel's full participation in the proceeding.

Coupled with the lack of effective participation of his counsel, the going forward by the Navy with its hearing before the criminal trial resulted in a denial of due process. Defendant's reliance on Baxter v. Palmigiano, 425 U.S. 308 (1976) is misplaced. That case involved the rights of prison inmates at prison disciplinary hearings, circumstances which are quite different from those here.

In view of this Court's conclusion that plaintiff's due process rights have been violated, there is no need to consider his further argument that Section 6(b) of the APA requires that counsel fully participate in the hearing of the kind involved here. Plaintiff in this case is entitled to injunctive relief because of a constitutional infringment of his rights, and it is therefore not necessary for the Court to also consider whether his rights were violated under a federal statute.

Defendants have argued that Wimmer was not damaged by this violation of his rights, because he still could not have prevailed if he had had full trial-type representation by counsel. This Court would disagree. There is simply no way of determining the outcome of a proceeding of this sort if counsel had been permitted to participate fully and if there had been no constraints on Wimmer's testifying fully, if he chose to do so. Officer Taksey was not cross-examined by counsel at the Navy hearing. Moreover,

full cross-examination by counsel of Burke and Curley might well have elicited facts to support Wimmer's contention that he made his confession pursuant to a promise that no proceeding at all would be brought against him by the Navy if he confessed. This, then, is much more than merely using the confession as evidence against him. If the promise had been made, the validity of the entire administrative proceeding would be suspect. Harmless error, therefore, is not an appropriate doctrine on this record. This Court should not and will not prejudge the outcome of a full and fair hearing at which Wimmer's counsel would participate.

The Court finds no merit to Wimmer's final contention based on 10 United States Code, Section 6962. No authorities have been cited as supporting counsel's argument in this regard nor have counsel pointed to any convincing legislative history which would suggest that Wimmer's interpretation of the language in question is appropriate. The claim based

on Section 6962 will therefore be rejected.

Insofar as the question of relief is concerned, it should be emphasized that plaintiff is entitled, at this stage of the case, to no more than a fair hearing before Navy personnel which would satisfiy the requirements of due process as outlined in this oral opinion. The final decision concerning his guilt or innocence of the charge should be made under Navy regulations by the appropriate Naval officials. It is not for this Court to usurp the authority of the Commandant in deciding whether or not Wimmer should be separated from the Academy and assigned to duty as an enlisted man. Pending a further hearing, there is no legal requirement that Wimmer be graduated with his class and awarded his degree at this time, or at any time in the reasonably near future.

So the preliminary injunction to be entered in this case will do no more than enjoin defendants from separating plaintiff from the Naval Academy and from assigning him to the Naval Reserve and to active duty as an enlisted

man, until a further hearing has been held which comports with Navy regulations and with the requirements of due process as outlined in this oral opinion.

Now, maybe counsel could prepare an appropriate order and if you would do that, Mr. Stevens, and get the approval of Mr. Davis as to form, present to me, and I will sign the order.

MR. STEVENS: Yes sir.

THE COURT: But meanwhile, I assume that no action will be taken pursuant to the agreement of counsel.

MR. DAVIS: That's correct, Your Honor.

THE COURT: All right, fine. Thank you, gentlemen, for your briefs and arguments in this case.

So I will wait until you submit that order.

MR. STEVENS: Thank Your Honor.

MR. DAVIS: Thank Your Honor.

THE COURT: Thank you, gentlemen.

(Thereupon, at 4:14 p.m., the aforecaptioned proceedings were concluded.)

- - - - -

REPORTER'S CERTIFICATE

I, George G. Davis, Jr., certify the foregoing as the official transcript of the aforecaptioned Oral Opinion.

/Signed/ George G. Davis, Jr.
OFFICIAL REPORTER

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

MIDSHIPMAN FIRST CLASS *
ROBERT O. WIMMER
*
Plaintiff
*
vs. CIVIL NO. H82-964
*
THE HONORABLE JOHN F.
LEHMAN, JR., et al *
Defendants *

** *** **

PRELIMINARY INJUNCTION

This matter having come before the Court for argument, briefs having been filed, and counsel having been heard, for the reasons set forth by this Court in its oral opinion, it is this 2nd day of August, 1982,

ADJUDGED, ORDERED AND DECREED, that the Defendants in this matter be, and they are hereby enjoined, from separating the Plaintiff as a Midshipman assigned to the United States Naval Academy, Annapolis, Maryland, assigning him to the United States Naval Reserve, and calling him to active duty for three years with said service, without granting Plaintiff

a full and fair administrative hearing conducted in compliance with requirements of due process, including full representation by counsel of Plaintiff's choice, in the traditional sense, during said hearing.

/Signed/ Alexander Harvey
JUDGE

Agreed to as to Form:

I Federick Motz
United States Attorney

By: /Signed/
Andre H. Davis
Asst. U. S. Attorney

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 82-1892

Midshipman First Class
Robert O. Wimmer,

Appellee,

vs.

The Honorable John F. Lehman, Jr.
Secretary of the Navy
and
Admiral E. C. Waller, Superintendent
United States Naval Academy,

Appellants.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause be, and the same is hereby, reversed.

/Signed/ William K. Slate, II
CLERK

Office-Supreme Court, U.S.
FILED
NOV 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-229

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT O. WIMMER, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether due process requires full participation by counsel in a hearing conducted by the United States Naval Academy to investigate alleged possession of marijuana by a midshipman, held while a state criminal proceeding involving the same drug offense is pending.

2. Whether 10 U.S.C. 6959 authorizes the Secretary of the Navy to order to active service in an enlisted capacity a midshipman discharged from the Naval Academy on grounds of misconduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-229

ROBERT O. WIMMER, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 705 F.2d 1402. The oral opinion of the district court on petitioner's motion for a preliminary injunction (Pet. App. 25a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 54a) was entered on April 28, 1983. The petition for a writ of certiorari was filed as of July 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

10 U.S.C. 6959 and 6962 are reproduced at Pet. 2-4.

STATEMENT

1. Petitioner enrolled as a midshipman at the United States Naval Academy in 1978 and was scheduled to graduate and receive a commission as a naval officer in June 1982. In August 1979, petitioner signed a form entitled "Statement and Acknowledgment of the Anti-Drug Abuse Policy of the U.S. Naval Academy" (C.A. App. 221). In executing the Statement, petitioner acknowledged that he had been "fully informed that the U.S. Naval Academy will not tolerate any drug abuse" and that illicit drug involvement, including use or possession of marijuana, violated military regulations and Maryland state law and normally would result in separation from the Academy; he also agreed that he would abide by the described anti-drug abuse policy of the Academy.

On December 13, 1981, petitioner was arrested by the Annapolis, Maryland, police for possession of marijuana. Trial on the criminal charges was set for March 19, 1982. Local authorities informed the Naval Academy that petitioner had been arrested and charged with unlawful possession of a controlled dangerous substance. Thereafter, petitioner was interviewed by a Naval Investigative Service ("NIS") special agent and admitted to marijuana use and possession.[1] Pet. App. 4a-5a, 10a, 26a.

On December 18, 1981, the Naval Academy notified petitioner that it was referring him for an investigative hearing — the initial stage of the Academy's disciplinary process — to consider whether he had violated the Academy's prohibition on possession or use of marijuana (C.A. App. 35-37). The notice alleged three separate violations of the Academy's disciplinary code (including, inter alia, the

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[1] At the time of the interview, petitioner was told that he had the right to remain silent. However, he executed a formal waiver of rights. Pet. App. 11a-12a n.5.

possession of marijuana at issue in the state criminal proceedings) and advised petitioner that "[a] finding of guilt * * * could result in a recommendation that you be administratively separated from the Naval Academy because of your misconduct" (*id.* at 35). Petitioner was provided with copies of all documents underlying the allegations against him and advised of the rights that would be afforded him at the investigative hearing, including the right to present evidence and examine witnesses (*id.* at 35-36).

The investigative hearing was held on January 13, 1982. The investigating officer's role was impartially to "determine whether or not each offense is substantiated by the evidence" (C.A. App. 48). The hearing was noncriminal and nonadversarial in nature; there was no prosecutor, and formal evidentiary rules were not followed. Because state criminal charges were pending in connection with one of the incidents being investigated, the Commandant of Midshipmen departed from the Academy's normal practice and permitted petitioner to be accompanied by counsel at the hearing (*id.* at 48-49). However, the Commandant limited the role of petitioner's attorneys at the hearing:

> Counsel will be present in a limited role at the Investigative Hearing. The purpose of counsel's presence at the Investigative Hearing is only to safeguard the midshipman's rights at the criminal proceedings, not to affect the outcome of the disciplinary hearing. Counsel's principal functions will be to advise the midshipman whether he should answer questions, what he should not say so as to safeguard himself from self-incrimination; and to observe the proceedings first-hand, so as to be better prepared to deal with attempts to introduce evidence from the hearing in later criminal proceedings. To fulfill these functions, counsel needs to speak to no one but the midshipman. Counsel

> should, however, be available to consult with the midshipman at all stages of the hearing, especially while the midshipman is being questioned.

Ibid. Both civilian and military counsel accompanied petitioner at the hearing (*id.* at 55-56). The investigating officer rejected petitioner's objections to the limitations the Commandant had placed on counsel's role and denied petitioner's request to delay the investigative hearing pending completion of the state criminal proceedings (*ibid.*). Petitioner was afforded the rights selectively to testify or remain silent and to have no adverse inferences drawn from his silence (Pet. App. 5a, 17a).

The investigating officer heard the testimony of several witnesses, including the arresting municipal police officer who had discovered marijuana in petitioner's vehicle, an NIS special agent who had conducted tests that confirmed that the substance seized from petitioner at the time of his arrest was marijuana, and the NIS special agent to whom petitioner had admitted his purchase of an ounce of marijuana (C.A. App. 56-57).[2] On the basis of the evidence presented, the investigating officer found that petitioner had possessed and used marijuana in violation of Naval Academy regulations (*id.* at 59), and the officer's written report to that effect was forwarded to the Commandant for consideration.

Petitioner was given the opportunity to submit additional evidence to the Commandant, but he declined to do so (Pet. App. 6a, 15a n.6). At the hearing before the

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[2]Petitioner contended that his confession had been procured by promises of leniency. The investigating officer found no basis for believing that the confession was improperly induced and concluded that "[e]ven if the confession had not been obtained, the Respondent's guilt of the offense of possession of marijuana would have been clearly established by testimony of the Annapolis police officer and the NIS drug analysis" (C.A. App. 60).

Commandant, petitioner again was permitted the limited assistance of counsel (C.A. App. 99). The Commandant considered the evidence and issues raised at the investigative hearing and a Naval Academy performance summary prepared by petitioner's Company Officer (*id.* at 91-94, 97-98). The Commandant found that petitioner had committed the specified violations. On the basis of the Academy's "zero tolerance for the use of marijuana" (Pet. App. 33a) and petitioner's otherwise nonexemplary performance record, the Commandant recommended to the Secretary of the Navy that petitioner be discharged from the Naval Academy and transferred to the Naval Reserve for three years' active duty in enlisted status, pursuant to 10 U.S.C. 6959. The Superintendent of the Academy joined in this recommendation. C.A. App. 116-120. The Superintendent invited petitioner to resign in lieu of discharge (*id.* at 113), but petitioner declined to do so. On January 29, 1982, the discharge recommendation was forwarded to the Secretary of the Navy, and on April 12, 1982, the Secretary discharged petitioner from the Academy and ordered him transferred to the Naval Reserve (*id.* at 133). Meanwhile, in March 1982 petitioner was acquitted of the state criminal charges.[3]

2. Petitioner brought this action in the United States District Court for the District of Maryland on April 15, 1982, seeking to enjoin the Secretary of the Navy and the Superintendent of the Naval Academy from discharging him from the Academy or assigning him to further military duty (C.A. App. 8). The district court ruled orally (Pet. App. 25a-51a) that the restrictions placed on the participation of petitioner's attorneys in the investigative hearing and the Academy's refusal to delay its proceedings until the

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[3]Petitioner's acquittal resulted from the prosecution's failure to have one of its exhibits ready and the state court's refusal to postpone the trial (Pet. App. 16a n.7).

state criminal charges were adjudicated combined to deny petitioner due process of law. The district court preliminarily enjoined the Academy from discharging petitioner and ordering him to active duty until a further hearing, consistent with the court's opinion, could be conducted. At the same time, the district court found no merit to petitioner's contention that the Navy lacked authority to order him to active duty in enlisted status if his discharge from the Academy were sustained following the new hearing (Pet. App. 48a-49a).

3. The government appealed the district court's constitutional ruling. Petitioner cross-appealed, contending that 10 U.S.C. 6959 did not authorize the Secretary to order him to active duty if he were discharged from the Academy. The court of appeals decided both issues in the government's favor (Pet. App. 1a-24a).

a. The court of appeals concluded that the Academy's proceedings comported with due process requirements. It cited this Court's instruction that "due process is flexible and calls for such procedural protections as the particular situation demands" (Pet. App. 7a, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The court of appeals noted that petitioner had been given "full notice" of the charges against him, that the investigative hearing "was non-criminal, and was conducted in a non-adversarial manner," with no opposing counsel, and that petitioner had been given the opportunity to present evidence and examine witnesses with the guidance of counsel (Pet. App. 8a-9a). In view of these factors, the presumed intelligence of those selected as midshipmen, and the Academy's interest in maintaining a relatively informal procedure, the court of appeals concluded that due process requirements had been satisfied (*id.* at 7a-9a).

The court of appeals rejected petitioner's contention that the Academy's refusal to allow counsel to conduct examination or to postpone its own disciplinary process until the resolution of the state criminal charges amounted to a constitutional violation. The court noted that petitioner had been afforded the right selectively to remain silent and the right to consult with counsel throughout the administrative hearing process (Pet. App. 5a, 9a, 19a). The court also held that, even if the Academy had violated petitioner's constitutional rights in denying his counsel full participation in the hearing, the error was "harmless" under the circumstances, since petitioner ultimately was found not guilty of the state criminal charges, and since petitioner had failed to demonstrate that participation by counsel would have resulted in any material differences in the hearing (*id.* at 10a-16a).

b. The court of appeals affirmed the district court's conclusion that 10 U.S.C. 6959 authorized the Secretary of the Navy to order petitioner to three years of enlisted duty in the active reserves following his discharge from the Naval Academy (Pet. App. 19a-24a). Section 6959 provides in pertinent part:

> (a) Each midshipman * * * shall sign an agreement that, unless sooner separated, he will —
>
> (1) complete the course of instruction at the Naval Academy;
>
> * * * * *
>
> (b) A midshipman who does not fulfill his agreement under subsection (a) may be transferred by the Secretary of the Navy to the Naval Reserve or the Marine Corps Reserve in an appropriate enlisted grade or rating, and * * * may be ordered to active duty to serve in that grade or rating for such period of time as the Secretary prescribes but not for more than four years.

The court of appeals agreed with the Secretary that the condition "unless sooner separated" in Section 6959(a) refers to separations from the Navy, rather than to separations only from the Naval Academy, and does not prohibit the transfer and activation of midshipmen who are merely separated from the Academy. The court noted that "[i]t would be a great waste for the government to lose its investment in training what proved to be unsatisfactory midshipmen if it could not put them in a lesser spot which they were capable of filling" (Pet. App. 22a). The court recognized that the Third Circuit had recently construed the statute not to authorize such action in the case of a midshipman who had been discharged from the Academy for disciplinary reasons. *Dougherty* v. *Lehman*, 688 F.2d 158 (1982). The court of appeals nonetheless concluded that the Secretary's interpretation of the phrase "unless sooner separated" in Section 6959(a), embodied in longstanding administrative regulations, was the more logical one and certainly was not plainly erroneous or inconsistent with the statute (Pet. App. 22a-24a).

ARGUMENT

The Naval Academy afforded petitioner procedural safeguards equal to or greater than those that courts have approved for student disciplinary proceedings held by civilian learning institutions. Petitioner's contention that even greater protections were constitutionally required for the investigative hearing in his case is without merit. In addition, the court of appeals' conclusion that 10 U.S.C. 6959 authorizes the Secretary to transfer to the active reserves a midshipman discharged from the Academy on disciplinary grounds is clearly correct. Although the Third Circuit has adopted a conflicting interpretation, the conflict is not of sufficient importance to warrant this Court's attention at this time.

1. Petitioner contends (Pet. 6-9) that he was denied procedural due process because the Naval Academy did not permit his counsel (as opposed to petitioner himself) to present and cross-examine witnesses during the investigative hearing.[4] But due process does not invariably require that all the formal procedures of a trial be afforded to participants in an administrative hearing. Rather, the Court has required only

> that "a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it." * * * All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," * * * to insure that they are given a meaningful opportunity to present their case.

Mathews v. *Eldridge*, 424 U.S. 319, 348-349 (1976) (citations omitted). The hearing in this case was noncriminal and nonadversarial in nature, and petitioner was not pitted against an "opposing counsel." Petitioner, a fourth year student possessing the level of intellect and judgment necessary to gain admission to the Naval Academy, was afforded a full opportunity to review all of the charges against him in advance of the hearing, to present evidence through witnesses and his own testimony, to cross-examine witnesses, to invoke the right to keep silent on a selective basis, and to consult with counsel about his statements, questions and tactics before, during and after the hearing. These procedures were clearly sufficient to satisfy the demands of due process under the circumstances. See *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974).

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[4]In the courts below petitioner also challenged the Naval Academy's decision not to postpone its own disciplinary process pending the conclusion of the state criminal proceeding. See Pet. App. 16a-19a. However, he does not raise that claim at this stage.

A number of courts have recognized that it would be inappropriate to impose elaborate procedural requirements — including the right to be represented by counsel — in connection with disciplinary proceedings at civilian learning institutions. See, *e.g.*, *Sohmer* v. *Kinnard*, 535 F. Supp. 50, 54 (D. Md. 1982); *Garshman* v. *Pennsylvania State University*, 395 F. Supp. 912, 920-921 (M.D. Pa. 1975); *Haynes* v. *Dallas County Junior College District*, 386 F. Supp. 208, 211-212 (N.D. Tex. 1974); *Barker* v. *Hardway*, 283 F. Supp. 228, 237-238 (S.D. W. Va.), aff'd, 399 F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905 (1969). Cf. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 158-159 (5th Cir.), cert. denied, 368 U.S. 930 (1961). It would be even less appropriate to impose such adversary procedures on student disciplinary proceedings at military academies in view of the special considerations applicable to military training and discipline. See *Middendorf* v. *Henry*, 425 U.S. 25, 38 (1976) (fact that a proceeding occurs within the military community is significant and is entitled to controlling weight in determining whether a Sixth Amendment right to counsel exists); *Parker* v. *Levy*, 417 U.S. 733, 749-752 (1974); *Love* v. *Hidalgo*, 508 F. Supp. 177, 183 (D. Md. 1981). Accordingly, the courts uniformly have agreed that due process does not require that those facing expulsion from service academies or military training programs be represented by counsel in disciplinary proceedings, even on a limited basis. See *Rustad* v. *United States Air Force*, No. 82-1567 (10th Cir. Sept. 28, 1983) (disenrollment from Air Force Academy); *Andrews* v. *Knowlton*, 509 F.2d 898, 904-907 (2d Cir.), cert. denied, 423 U.S. 873 (1975) (expulsion from West Point); *Hagopian* v. *Knowlton*, 470 F.2d 201, 211-212 (2d Cir. 1972) (same); *Wasson* v. *Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (dismissal from Merchant Marine Academy); *Kolesa* v. *Lehman*, 534 F. Supp. 590, 593-594 (N.D.N.Y. 1982) (disenrollment from Naval ROTC); *Hickey* v. *Commandant of Fourth Naval District*,

461 F. Supp. 1085, 1096-1097 (E.D. Pa. 1978), aff'd mem., 612 F.2d 572 (3d Cir. 1979) (same). See also *Middendorf* v. *Henry*, 425 U.S. at 42-48 (given the special needs of military discipline, due process does not require that an enlisted member of the Marine Corps be represented by counsel at a summary court-martial proceeding).

The fact that petitioner was facing a state criminal charge at the time the Naval Academy held its investigative hearing does not mandate a different result in this case. See *Rustad* v. *United States Air Force*, *supra*. See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976). The Academy departed from its usual rule of prohibiting representation by counsel at such hearings in order to accommodate the special circumstances presented by petitioner's case. See page 3, *supra*; Pet. App. 5a. By permitting petitioner to confer with counsel before he offered testimony, and by allowing petitioner to testify selectively without having any negative inference drawn from his silence, the Academy did more than was necessary to protect petitioner's collateral interests in connection with the state proceeding. The First Circuit has suggested that due process would be satisfied by permitting such limited assistance of counsel in an academic disciplinary hearing at a *civilian* institution in the case of a student facing state rape and assault charges. *Gabrilowitz* v. *Newman*, 582 F.2d 100, 105-107 (1978). See also *Nzuve* v. *Castleton State College*, 133 Vt. 225, 335 A.2d 321 (1975). In fact, petitioner was given more rights than the university student in *Gabrilowitz*, who apparently did not have the option of testifying or remaining silent on a selective basis. Petitioner fails to cite any authority for the proposition that the pendency of related criminal charges entitled him to unlimited representation by counsel in an investigative hearing within the academic disciplinary process.[5]

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[5]Petitioner also notes (Pet. 7) that the Navy could have instituted court martial proceedings against him based on his possession of marijuana. It is true that virtually any violation of Academy regulations

In addition, petitioner does not specify what particular advantage he would have derived from such unlimited representation in this case. The court of appeals was correct in its alternative conclusion that, assuming arguendo there was a due process violation, in the circumstances of this case "the deprivation of examining counsel was harmless error as a matter of law" (Pet. App. 16a). The court of appeals carefully examined the record — which included an abundance of uncontradicted evidence that petitioner had violated the Academy's regulations — and concluded that additional participation by petitioner's attorneys would not have affected the outcome of the investigative hearing (*id.* at 13a-15a). Moreover, as the court of appeals noted (*id.* at 16a), petitioner could not have been prejudiced in his defense of the state criminal charges, since those charges ultimately were dismissed at trial on unrelated grounds.[6] Indeed, to the extent petitioner's due process claim rests on the pendency of criminal proceedings against him, his claim is moot, since he is no longer facing criminal charges in connection with the conduct that was the subject of the investigative hearing. Petitioner's due process claim clearly does not warrant this Court's attention.

2. Petitioner also seeks review of the court of appeals' determination (Pet. App. 19a-24a) that 10 U.S.C. 6959 empowers the Secretary to transfer to active duty a midshipman who is discharged from the Naval Academy on

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could result in a court martial. However, this happens only rarely, and there were no court martial proceedings in petitioner's case. In any event, the possibility of court martial proceedings would not entitle an individual to unlimited representation of counsel in the Academy's disciplinary process any more than would the pendency of state criminal charges.

[6]See page 5 note 3, *supra*.

disciplinary grounds.[7] Review of that issue is unwarranted because the court below correctly construed the statute.

Under 10 U.S.C. 6959(a), a midshipman must agree in writing that "unless sooner separated" he will complete his course of instruction at the Naval Academy and accept a commission as an officer; under Section 6959(b), a midshipman "may be transferred by the Secretary of the Navy" to serve for a period of up to four years of active duty in an enlisted status if he "does not fulfill his agreement under subsection (a)."[8] Relying principally on the Third Circuit's decision in *Dougherty* v. *Lehman*, 688 F.2d 158 (1982), petitioner contends that a midshipman who is discharged for disciplinary reasons prior to graduation has been "sooner separated" within the meaning of Section 6959(a) and thus is not subject to the transfer and activation provisions of Section 6959(b). The court below correctly concluded that the phrase "unless sooner separated" refers to separations from the Navy, not from the Naval Academy. Midshipmen who have been separated only from the Academy — for disciplinary or other reasons — accordingly may be transferred to active duty in the Navy or Marine Corps Reserve in the Secretary's discretion pursuant to Section 6959(b). Accord, *Green* v. *Lehman*, 544 F. Supp. 260, 263-264 (D. Md. 1982), appeal docketed, No. 83-1521 (4th Cir.).

The court of appeals' interpretation is supported by examination of the context of 10 U.S.C. 6959 and 6962 and by consideration of the purpose of the statute. A midshipman entering the Naval Academy simultaneously assumes an obligation to the Academy and an obligation to serve six

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[7]See page 7, *supra*, for the relevant portions of the text of Section 6959.

[8]Parallel statutory provisions govern the obligations of persons entering West Point and the Air Force Academy. See 10 U.S.C. 4348 and 9348.

years in the Navy. See 10 U.S.C. 651 and 6959; S. Rep. 1514, 88th Cong., 2d Sess. 4 (1964). Section 6962 explicitly authorizes the Secretary, in his discretion, to order that a midshipman who lacks the requisite aptitude or is guilty of a disciplinary infraction be discharged from the Naval Academy, from the United States Navy, or from both (see Pet. App. 20a-21a). Likewise, the term "separated" in Section 6959(a) (which refers back to sanctions invoked by the Secretary pursuant to Section 6962) could refer to a separation either from the Naval Academy or from the Navy (or from both). The court of appeals reasonably concluded that a midshipman who is discharged for violating the disciplinary rules of the Academy has thereby failed to "complete the course of instruction" (10 U.S.C. 6959(a)(1)) and is accordingly subject to transfer to enlisted duty *unless* he is *also* discharged (*i.e.*, "separated") from the Navy.

Although this construction may not be the only possible reading of the phrase "unless sooner separated," it is the one that logically effectuates the purpose of the statute. As the court of appeals noted (Pet. App. 22a), a different construction would result in considerable waste, since the government would lose its investment in training a midshipman in cases like this one. Moreover, the court of appeals' construction is consistent with the legislative history. Congress enacted Section 6959(b), authorizing the Secretary to order a midshipman to enlisted service, in order to close a loophole that previously allowed an individual who failed to complete the course of instruction to avoid his military service obligation altogether. See S. Rep. 1514, *supra*, at 4. Congress was particularly troubled by the fact that individuals who avoided their military service obligations by failing to qualify for a commission had received valuable educational subsidies without providing the government with a quid pro quo. See *ROTC Vitalization Act of 1964: Hearing on H. R. 9124 Before the Senate Comm. on Armed Services,*

88th Cong., 2d Sess. 39-40 (1964) (remarks of Sen. Thurmond); *Reserve Officers' Training Corps Program: Hearings Before Subcomm. No. 3 of the House Comm. on Armed Services*, 88th Cong., 1st Sess., No. 33, 6532-6534, 6599, 6602, 6629, 6715, 6836, 6849-6850 (1963). The decision below comports with congressional intent by construing the statute to provide that midshipmen may be required to fulfill their service obligations in an enlisted capacity if they fail to qualify for their officer's commission because they breached the Academy's disciplinary code.[9]

The court of appeals' decision also construes the phrase "unless sooner separated" consistently with interpretative regulations promulgated by the Department of Defense and the Navy. See DOD Directive No. 1332.23 para. V.A.2; Naval Personnel Manual art. 3850400, paras. 2, 3, 6.b(4) (C.A. App. 230-231). Since these agencies are charged with administering the statutory provisions at issue, their construction of those provisions is entitled to considerable deference. *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-668 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Third Circuit's contrary decision in *Dougherty* v. *Lehman*, *supra*, is untenable and seems unlikely to be followed by other circuits. The *Dougherty* court construed the phrase "unless sooner separated" as excusing from the transfer provision of Section 6959(b) a midshipman who, like petitioner, was involuntarily separated from the Naval

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[9]The decision below also results in similarity of treatment of students enrolled in Reserve Officer Training Corps ("ROTC") programs at state and private educational institutions and their fellow officers-in-training at the service academies. 10 U.S.C. 2105, the ROTC counterpart to Section 6959(b), has been construed to authorize the Secretaries of the military departments to order a college student involuntarily discharged from the ROTC program to active duty status upon graduation from college. *Hickey* v. *Commandant*, 461 F. Supp. at 1094-1095. See also 10 U.S.C. 2107(f).

Academy for disciplinary reasons. At the same time, however, the *Dougherty* court recognized that Congress, in enacting 10 U.S.C. 6959(b), specifically intended to subject to enlisted duty those midshipmen who were involuntarily discharged from the Naval Academy for violating the Academy's rule against marrying prior to graduation. 688 F.2d at 163-164. Faced with this inconsistency, the Third Circuit (on the basis of what the court below characterized as "less than conclusive" legislative history, Pet. App. 23a) construed Section 6959(b) to permit the transfer and activation of a midshipman who "violates the rules [of the Academy] with the purpose of provoking a discharge," but not to permit such action in the case of a midshipman who violates the Academy's rules without the intent of being discharged. The Third Circuit's decision thus attributes to Congress a desire to tie the Secretary's transfer authority to the subjective intent of the midshipman at the time he engages in the conduct that leads to his discharge from the Academy. That unwieldy standard finds no support in the statute itself.

It is not surprising that the court below was simply "unable to follow the [*Dougherty*] court's reasoning" (Pet. App. 23a). We believe the *Dougherty* opinion is of such questionable merit that review by this Court to resolve the conflict in the circuits is unnecessary at the present time.[10] The logic of the decision below seems likely to prevail in future cases. Moreover, because the Naval Academy is physically located within the Fourth Circuit, the decision below is likely to be controlling from a practical standpoint. The Department of the Navy advises us that there have been

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[10]The Third Circuit itself, in denying a request for attorneys' fees, characterized *Dougherty* as presenting an "exceedingly close question of law" and noted that the arguments and precedents cited in the Secretary's rehearing petition in that case "make a strong case for his interpretation of the statute, regulations, and his authority." *Dougherty* v. *Lehman*, 711 F.2d 555, 566 (1983).

only a handful of judicial actions involving transfer authority under 10 U.S.C. 6959 and the parallel provisions applicable to other branches of the military. There will be future opportunities for the Court to consider this issue if other courts should adopt the *Dougherty* court's reasoning or if the issue should assume greater significance than it now appears to have.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1983

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[11]Moreover, the Department of Defense is in the process of preparing clarifying legislation that, if enacted by Congress, would eliminate any remaining ambiguity and would endorse the decision below. If such legislation were enacted, it would eliminate any need to resolve the conflict between this case and *Dougherty*.

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